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# Between the formal and the informal: ‘repeat players’, ‘one-shotters’ and case trajectories in intellectual property infringement litigation at the Scottish Court of Session

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## Abstract:

This article presents findings from new empirical research into intellectual property (‘IP’) infringement litigation at the Court of Session in Scotland, analysing a dataset of Court of Session IP actions created from court files for the seven-year period from 2008 to 2014. The data provides significant new insights into the dynamics of IP infringement litigation over the lifecycle of a court action, highlighting the intersection of ‘formal’ court processes with ‘informal’ out-of-court decision-making and settlement at all stages throughout the litigation process. Examining, among other matters, the relative experiences of ‘repeat players’ and ‘one-shotters’, this article also considers the aptness, or otherwise, of aspects of economic and socio-legal disputing theory in the context of IP infringement disputes.

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## 1. Introduction

This article presents findings from new empirical research into intellectual property (‘IP’) litigation at the Court of Session in Scotland, funded by the UK Research Councils as part of CREATE, the RCUK Centre for Copyright and New Business Models in the Creative Economy.<sup>1</sup>

Effective civil enforcement mechanisms play an essential role in the functioning of the IP system. There has, however, been surprisingly little empirical research into IP enforcement in the UK to date, and none in Scotland. This article focuses on the first phase of this research project, examining IP infringement litigation at the Scottish Court of Session with particular emphasis case trajectories and outcomes.<sup>2</sup> The findings in this paper are drawn from analysis of a new dataset of Court of Session IP actions created specifically for this project from court files for the seven-year period from 2008 to 2014.

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Preliminary findings from this project were presented at the Socio-Legal Studies Association Annual Conference, University of Lancaster, 2016, and at a CREATE litigation research workshop, Queen Mary University of London, 2016. The author wishes to thank participants for their comments and the Lord President of the Court of Session and his office, the Scottish Courts and Tribunals Service and staff of the Court of Session for facilitating this research.

<sup>1</sup> See [www.create.ac.uk](http://www.create.ac.uk).

<sup>2</sup> The project also involved a survey and interviews with Scottish legal practitioners, findings from which are reported in J. Cornwell, ‘Intellectual Property Litigation at the Court of Session: A First Empirical Investigation’ (Edinburgh Law Review, May 2017, forthcoming) alongside further Court of Session data not analysed here.

Section 2 of this article reviews the existing empirical research into IP litigation in the UK and key questions raised by the wider socio-legal and economic literature. Section 3 outlines the process of data collection. Section 4 examines data gathered on the cases reviewed, their parties and case trajectories, including grant of interim interdict (interim injunction), progress through the court's procedural timetable, case durations and outcomes. Section 5 comments on the key findings.

The Court of Session's relatively small IP case load may impact on the broader statistical significance of the findings reported here. However, it also provides an invaluable opportunity to examine individual cases and their trajectories with a closeness which may not be possible in larger-scale work, particularly where physical review of court files is required for data collection. The data gathered in this project is rich and detailed, offering significant new insights into the dynamics of IP infringement litigation. Highlighting the interaction between 'formal' court activity and 'informal' out-of-court decision-making and settlement throughout the lifespan of infringement litigation, the data both supports and challenges the aptness of certain wider economic socio-legal theories in their application to IP infringement disputes.

## **2. Background: existing UK research and wider theoretical frameworks**

In a literature review prepared in 2009 for the UK Strategic Advisory Board for Intellectual Property Policy, Weatherall et al noted that there had not been any systematic attempts to gather data on the filing or progress of IP cases before the UK courts.<sup>3</sup> Since then, three research projects in particular have sought to analyse court data on IP litigation in the UK. Greenhalgh et al reviewed Patents Court (High Court) IP cases from 2003 to 2009, although, working only from listed cases, their data was limited.<sup>4</sup> More recently, Helmers et al have been conducting a review of all IP litigations at the English High Court/Patents High Court and Patents County Court/Intellectual Property Enterprise Court, reporting so far on case counts, parties, sectors, and certain data on case durations, filing and settlement rates over time.<sup>5</sup> Burrow has also been investigating the IPEC small claims track.<sup>6</sup>

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<sup>3</sup> K. Weatherall, E. Webster and L. Bentley, 'IP Enforcement in the UK and Beyond: A Literature Review', SABIP, 2009 (<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipso.gov.uk/ipresearch-ipenforcement-200905.pdf>), p6.

<sup>4</sup> C. Greenhalgh, J. Phillips, R. Pitkethly, M. Rogers, J. Tomalin, 'Intellectual Property Enforcement in Smaller UK Firms', UK IPO, 2010 (<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipso.gov.uk/ipresearch-ipenforcement-201010.pdf>), pp55-63. The authors also conducted survey and interview research.

<sup>5</sup> Most recently: C. Helmers, Y. Lefouili and L. McDonagh, 'Examining Patent Cases at the Patents Court and Intellectual Property Enterprise Court 2007-2013', UK IPO, 2015 (<https://www.gov.uk/government/publications/examining-patent-cases-at-the-patents-court-and-ipeec-2007-2013>); C. Helmers, Y. Lefouili and L. McDonagh, 'Evaluation of the Reforms of the Intellectual Property Enterprise Court 2010-2013', UK IPO, 2015 (<https://www.judiciary.gov.uk/publications/evaluation-of-the-reforms-of-the-intellectual-property-enterprise-court/>); C. Helmers, Y. Lefouili and L. McDonagh (2016) 'The Effect of Fee-Shifting on Litigation: Evidence from a Court Reform in the UK' (Report No. 16-740), Toulouse School of Economics.

<sup>6</sup> S. Burrow, 'Assessing the IP Small Claims Track' (<http://www.create.ac.uk/research-programme/theme-3/wp3d2-assessing-the-ip-small-claims-track/>).

These three projects are all focussed on England and Wales; there has been no equivalent empirical research in Scotland. There are also further questions to be explored. How far do IP infringement cases actually progress, in procedural terms, before they come to an end? How successful are rightholders, not just in terms of final outcomes, but also in interim remedies? How many cases do the courts decide on the merits and how many do they dispose of some other basis? And how far, if at all, are trajectories or outcomes linked to different types of rightholder or infringement claim? Research addressing such questions benefits from the detailed data which it has been possible to gather in this project.

These questions also tie into issues raised in the wider socio-legal and economic literature. Take, for example, the question of how far IP infringement cases actually progress before coming to an end. Gallagher has argued that IP is no different to other contemporary areas of the civil justice system in its adherence to the 'dispute pyramid' widely discussed in the socio-legal literature - the lower levels of the pyramid consisting of claims as they arise and are disposed of without court action, the upper levels involving formal court processes and, in the smallest sub-set of cases, judicial adjudication.<sup>7</sup> Economic theory also expects few cases to make it to formal substantive adjudication, anticipating - all things being equal and the parties acting rationally - that straightforward disputes will settle with only more difficult or evenly-balanced cases more likely to go to trial.<sup>8</sup> Economic models also expect litigations to settle as uncertainty over the legal merits and asymmetry in the information available to the parties reduce as cases progress.<sup>9</sup> This research provides an opportunity empirically to contribute to examining how well these models may hold in the IP context.

A further theme in the socio-legal literature is also of particular interest. In his seminal article, *'Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change'*, Galanter highlighted imbalances between 'one-shotters' and 'repeat players' in their ability to achieve favourable outcomes in disputes in which they are involved.<sup>10</sup> Galanter identified 'one-shotters', who have only occasional recourse to the courts, as facing one of two problems: either the stakes are so high that they exceed the party's actual worth, or the claim may be so small, and thus procedurally unmanageable, that the cost of enforcement outweighs any potential benefit from enforcement.<sup>11</sup> Both of these scenarios are readily imaginable in the IP context, from the SME whose most valuable IP has been subjected to large-scale, highly-damaging copying to the individual creator who has found a single unauthorised copy of one of his works online.

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<sup>7</sup> W.T. Gallagher, 'Trademark and Copyright Enforcement in the Shadow of IP Law' 28 Santa Clara Computer & High Tech. L.J. 453, pp467-468, footnote 64. On the 'dispute pyramid', see: R.E. Miller and A. Sarat, 'Grievances, claims and disputes: Assessing the adversary culture' 15 Law & Soc'y Rev. 525 1980-1981, p545; M. Galanter, 'Reading the landscape of disputes: What we know and don't know (and think we know) about our allegedly contentious and litigious society', 31 UCLA L. Rev. 4 1983-1984.

<sup>8</sup> G.L. Priest and B. Klein, 'The Selection of Disputes for Litigation' 13 J. Legal Stud. 1 1984; W. Landes, 'An Empirical Analysis of Intellectual Property Litigation: Some Preliminary Results' 41 Hous. L. Rev. 749 2004-2005.

<sup>9</sup> D. Somaya, 'Strategic determinants of decisions not to settle patent litigation' Strat Mgmt J, 24: 17-38 (2003).

<sup>10</sup> M. Galanter, 'Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change', 9 Law & Soc'y Rev 95 1974-1975.

<sup>11</sup> Galanter, note 10, p98.

Galanter contrasted ‘one-shotters’ to ‘repeat players’ who experience and anticipate repeat litigation, routinely processing claims as part of their regular business activity.<sup>12</sup> Galanter identified ‘repeat-players’ as benefitting from a number of strategic advantages, particularly their generally lower stakes per case and resources to pursue long-term interests.<sup>13</sup> It has, however, been noted that repeat player status is typically highly correlated with wealth and power and thus that advantages enjoyed by repeat players in their capacity as such are hard to identify, particularly compared to other large and powerful litigants.<sup>14</sup> This project also affords an opportunity at least tentatively to explore the ‘one-shotter’/‘repeat player’ distinction in IP litigation, attempting as far as possible to meet the challenge of distinguishing ‘repeat players’ from larger litigants generally.

### 3. Data collection

This article focusses on IP infringement litigation at the Court of Session in Edinburgh. With wide competence over civil law matters, the Court of Session is Scotland’s specialist IP court. Most Court of Session IP litigation will be governed by the special procedural rules in Chapter 55 of the Rules of the Court of Session (‘Chapter 55’).<sup>15</sup> Cases proceeding under Chapter 55 are called ‘IP actions’. IP actions may include infringement claims and/or other matters such as challenges to the validity of an IP right or disputes over ownership.<sup>16</sup> Chapter 55 was reformed in November 2012 with emphasis on increased and earlier case management.<sup>17</sup>

There is no publicly-accessible database of Chapter 55 IP actions and it was necessary to gather all data for this project by manually reviewing the physical court files. Research access was granted by the Lord President of the Court of Session and detailed terms of access were agreed, a key requirement being that data should be anonymous.<sup>18</sup>

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<sup>12</sup> Galanter, note 10, p108.

<sup>13</sup> Galanter, note 10, pp98-100 and Figure 3, p125.

<sup>14</sup> R. Lempert, ‘A Classic at 25: Reflections on Galanter’s “Haves” Article and Work It Has Inspired’ 33 Law & Soc’y Rev. 1099 1999, p1103. Lempert highlights the need, empirically, for clearer comparison between powerful parties which are repeat players and those which are not and suggests that a ‘constellation of attributes’ may be relevant: p1107.

<sup>15</sup> Chapter 55 governs cases involving patents, registered trade marks, registered and unregistered designs, passing off and copyright, although passing off has only been included in this list since November 2012. IP cases not required to be brought under Chapter 55 (actions for breach of confidence and, before November 2012, passing off) and IP-related other procedures (such as applications for pre-action disclosure) can additionally be brought on other court tracks at the Court of Session. As it is not possible readily to isolate any such cases from the very considerably greater overall body of litigations proceeding on those other tracks, it was considered unworkable to attempt to search for any such files as part of this research project.

<sup>16</sup> They may also include non-IP elements, such as breach of contract or defamation. Any such additional elements are not considered further here.

<sup>17</sup> Wider reforms to the overall Scottish civil justice system have more recently come into effect as a result of the Gill Review in 2009, but do not impact on the time period under review in this project and are not discussed here.

<sup>18</sup> The terms of research access also do not permit the Court of Session dataset to be made publicly available.

Data collection took place at the Court of Session in July and September 2015. A complete listing of all Chapter 55 IP actions commenced in the calendar years 2008 to 2014 was provided by the court. Case files were located and reviewed working from that list. All data was collected personally by the author, reviewing each file in full through to the last procedure on record. Data was collected into an Excel spreadsheet and analysed quantitatively primarily using SPSS.

Overall, 103 Chapter 55 IP actions were commenced in the period 2008-2014. Court files were reviewed for 102 of these actions, with one action not available for review. Not all data collected can be reported on in this paper, which will focus on analysis of case trajectories and the related matters highlighted in sections 1 and 2 above.<sup>19</sup>

For each action, data was recorded on parties' industry sectors and whether parties were individuals or some form of legal person.<sup>20</sup> It was noted for all legal persons whether they were involved in one or multiple IP actions within the dataset. Adopting an approach taken in recent empirical research into copyright litigation in the US,<sup>21</sup> each action was coded according to the size of the largest of the rightholder parties and the largest of the alleged infringers for which firm size data was collected.<sup>22</sup> The IP rights in issue were noted, along with details of the nature of the claim. Data was also collected on remedies and legal representation.<sup>23</sup>

In terms of case trajectories, note was taken of when each action was commenced and the date of the last procedure on record. From this, it was calculated how long each action had been live before the court. Data was recorded on whether interim interdict was sought and, if so, whether it was granted. During data collection, it was observed that a number of interim interdicts were breached and, to track this, it was also noted whether any action was taken for breach of interim interdict. Data also was recorded on how far each

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<sup>19</sup> See Cornwell, note 2, for more analysis of parties and their industry sectors, the nature and range of IP issues in dispute and remedies sought.

<sup>20</sup> This data was gathered for all rightholders and for up to the first three alleged infringers. Abbreviated data was collected for the small number of further alleged infringers.

<sup>21</sup> C.A. Cotropia and J. Gibson, 'Copyright's Topography: An Empirical Study of Copyright Litigation' 92 Tex. L. Rev. 1981 (2013-2014), p1987.

<sup>22</sup> This was a two-stage process. First, each party's firm size was coded, for UK companies using the best available information on the Bureau van Dijk FAME database and for non-UK companies searching online to identify entities part of publicly-listed groups. Second, each action was coded according to the largest rightholder and alleged infringer for which firm size data was recorded (see note 20). Cases involving large UK-registered companies or overseas companies identified as part of publicly-listed groups were designated as involving 'large' rightholders or alleged infringers; cases involving UK SMEs and companies with total accounting exemptions were designated as involving 'small' rightholders or alleged infringers. In deciding which was the largest rightholder or alleged infringer, certain assumptions were made, with government bodies deemed largest, then 'large' companies, 'small' companies, charitable bodies and finally (if the sole rightholder or infringer) individuals. Some companies had become dormant, been dissolved or entered into liquidation such that firm size data could not be recorded; affected actions were coded accordingly.

<sup>23</sup> Specifically, whether parties were represented and, if so, whether the firms instructed by the parties were listed in the Legal 500 (2014 edition) for IP work in Scotland. Some law firm mergers had taken place since the time period under review, relevant firms being coded by reference to the merged firm identity. It was also noted for parties without legal representation whether they represented themselves as party litigants (litigants in person).

action progressed through the key steps in the Chapter 55 procedural timetable.<sup>24</sup> Further observing during data collection that a number of proofs (the Scottish expression for a trial) were discharged for settlement at short notice, data was collected on when major hearings were discharged. For concluded actions, all of this was supplemented with data on how the action was ultimately disposed of.<sup>25</sup>

#### **4. The Court of Session data**

Of the 102 Chapter 55 IP actions reviewed, 98 actions were initiated by rightholders for alleged infringement of their IP rights.<sup>26</sup> This article focuses on those 98 rightholder-commenced infringement actions. 92 such actions had, formally or informally, come to an end at the time of data collection; six were still live. This section begins by outlining key data on the parties and the claims in suit - focussing in particular on identifying any 'repeat players' and the principal characteristics of their cases - before turning to examine the data on interim interdict, progress through Chapter 55 procedure, how actions were concluded and case durations. Although the relatively small number of IP infringement actions reviewed limits the scope for detailed statistical analysis, nonetheless a rich and stimulating picture emerges.

##### **4.1 'Repeat players', 'bulk enforcers' and other rightholders**

On starting data collection, it rapidly became apparent that a significant proportion of the Court of Session's infringement caseload consisted of claims brought by what this article will call 'bulk enforcers': that is, entities such as collecting societies, bodies responsible for enforcing collective trade marks and major rightholders engaged in highly standardised IP enforcement against widespread infringements of their IP rights.

Some bulk enforcers - collecting societies, some software houses and certain major content owners, for example - are well-known. Bulk enforcers also stand out in data collection because of the standard-form pleadings typically used by them. In their research into US copyright litigation, reviewing US court files Cotropia and Gibson noted the 'uniformity' of the complaints filed by record/film-industry file-sharing complainants and performing rights organisations, highlighting actions by software companies against pirated software as a 'similarly formulaic' form of repeat litigation.<sup>27</sup> They described this as a form of 'cost of doing business' litigation: infringements were, individually, typically low-level and liability was not generally in doubt.<sup>28</sup>

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<sup>24</sup> As other, ad hoc procedural steps could vary widely, incidental procedural steps outwith the core Chapter 55 timetable could not be systematically recorded.

<sup>25</sup> Not including intermediate disposals (for example, against one infringer of several) after which the action remained live.

<sup>26</sup> Four actions were brought against the rightholder: three concerning the UK statutory prohibitions against groundless threats of infringement; and one seeking a declaration of non-infringement.

<sup>27</sup> Cotropia and Gibson, note 21, pp1989, 1991, 2004 and 2013-2014.

<sup>28</sup> Cotropia and Gibson, note 21, p2013.

Responding to the Court of Session data, rightholders identified as engaging in this kind of bulk enforcement were coded as such during data collection. Six different bulk enforcers were identified in the Court of Session dataset, suing alone or jointly with another member of their corporate group. Between them, those six bulk enforcers brought 34 infringement claims: 34.7% of the 98 infringement actions in the dataset. Barring one other party not considered to be a bulk enforcer,<sup>29</sup> bulk enforcers were the only rightholders noted as involved in more than one claim. All bulk enforcement claims were against parties noted in data collection as ‘one-shotter’ defenders.<sup>30</sup>

The bulk enforcement claims in the dataset displayed a high degree of homogeneity. Although a small number (4 actions) involved trade marks, by far the majority (30 actions) concerned copyright. There were no bulk enforcement claims relating to any other IP rights, and no challenges to the validity of bulk enforcers’ rights. Most bulk claims related to broadcast content or music and were brought against alleged infringers active in the hospitality sector (pubs, bars and cafes).<sup>31</sup> The cases appeared legally straightforward, typically involving (for copyright) unlicensed showing or playing of the relevant works or (for trade marks) counterfeiting or some other form of unauthorised retail using identical marks. As well as standard-form pleadings, standard-form supporting affidavit evidence of infringement was commonly relied upon. The remedies sought also showed little individualisation from one action to the next. Although spanning different rightholders and alleged infringers, 20 bulk enforcement actions claimed exactly £10,000 as the same standard-form sum in default of an account of profits from the alleged infringer’s activities; most other monetary claims appeared to be calculated on the basis of pre-set fee scales. At least insofar as pleaded on record,<sup>32</sup> the quantum claimed in the majority of bulk enforcement claims was low: 27 actions (79.4%) sought monetary remedies pleaded at £10,000 or less, with some claims of less than £1,500.<sup>33</sup>

It is difficult to probe further into the characteristics of the bulk enforcers in the dataset given their small number and this project’s anonymity requirements. There may be different kinds of ‘repeat player’ in the IP context and motivations for litigating may differ: in the Court of Session dataset, although most bulk enforcement claims were directed to recovery of unpaid licence fees or broadly similar lost revenue, some

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<sup>29</sup> With a couple of cases coming several years apart and in relation to quite different subject matter, there was no basis for regarding that other rightholder as a ‘bulk enforcer’ or ‘repeat player’ in Galanter’s sense.

<sup>30</sup> As explained in section 3, data on the number of actions in which parties were involved was collected for legal persons only.

<sup>31</sup> 20 actions (58.8% of bulk enforcement claims) involved infringement of copyright in broadcast content and 10 actions (29.4%) infringement of copyright in music/recorded music. 29 of those actions were brought against alleged infringers active in hospitality.

<sup>32</sup> In cases seeking an account of the infringer’s profits rather than damages, the sum ultimately payable by the infringer may exceed the sum pleaded on record which is, typically, a default sum to be paid in the event of the infringer failing to provide an account: see further Cornwell, note 2. See also the comments in section 5 regarding the importance of non-monetary remedies in IP cases.

<sup>33</sup> Three bulk enforcement actions sought no monetary remedies for infringement and four claimed monetary remedies of £50,000 or more.



cases sought to protect other interests, acting against counterfeiting and trade mark misuse. None of the bulk enforcement cases identified appeared to involve so-called ‘IP trolls’.<sup>34</sup>

Whatever the underlying interests at stake, the parties identified as bulk enforcers in this research are paradigms of Galanter’s ‘repeat players’ – handling high volumes of easily-processed and standardised ‘cost of doing business’ litigation with individually relatively low stakes per case. They should not, however, all be thought of as IP monoliths. As Galanter noted (specifically identifying the holders of performing rights as examples of ‘one-shotter’ claimants) repeat players may be ‘champions’ of the ‘have nots’.<sup>35</sup> IP collecting societies and other collective bodies take legal action on behalf of their membership who, as individual artists, creators or other enterprises, may not enjoy the accumulated experience or resources of their collective representatives. Those individual members’ claims are thereby transformed from ‘one-shotter’ to ‘repeat player’ status.

Most bulk enforcement activity in the dataset arose in the later years of the time period under review. Between 2008 and 2012 there were only four bulk enforcement claims, but this rose to six (54.5%) of a total of 11 infringement actions commenced in 2013 and 24 (77.4%) of 31 infringement actions in 2014. All bulk enforcers were represented by Legal 500 IP-listed firms of Scottish solicitors. As illustrated at Table 1, however, fewer than a quarter of bulk enforcement cases (23.5%) involved lawyers on the other side; the alleged infringers made no appearance at all – neither appearing for themselves nor through legal representation – in 67.6% of bulk enforcement cases.

**Table 1: Alleged infringers – representation**  
(Total actions: 98)

	Bulk enforcement actions		Non-bulk enforcement actions	
At least one alleged infringer legally represented	8	23.5%	44	68.8%
At least one alleged infringer appearing as party litigant <sup>36</sup>	3	8.8%	1	1.6%
No appearance/representation for any alleged infringers	23	67.6%	19	29.7%
Total	34		64	

Infringement claims brought by non-bulk enforcers (‘one-shotter’ rightholders, in Galanter’s terms) were far more diverse. Across the 64 non-bulk infringement claims in the dataset, rightholders and alleged infringers ranged from lone individuals or SMEs to large UK or overseas corporates, active in sectors ranging from oil

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<sup>34</sup> On the issue of IP trolls in the English courts, see C. Helmers, B. Love, L. McDonagh, ‘Is There a Patent Troll Problem in the UK?’ 24 Fordham Intell. Prop. Media & Ent. L.J. 509.

<sup>35</sup> Galanter, note 10, pp98 and 103.

<sup>36</sup> Including actions in which alleged infringers were initially legally represented but subsequently represented themselves.

and gas, agriculture and transport to fashion, sport and professional services. The only counterclaims challenging the validity of rightholders' IP rights, in 5 actions in total, were in non-bulk cases. Non-bulk cases covered all of the principal IP rights – not just copyright and trade marks, but also patents, designs, confidentiality, database and moral rights – and ranged in value from actions with no monetary remedies up to the largest pleaded claim in the dataset of £30 million.

As for bulk enforcement, on the data gathered no alleged infringers in the non-bulk cases were 'repeat players' in Galanter's terms.<sup>37</sup> The picture was different, however, in terms of legal representation. Among rightholders, non-bulk enforcers were represented by Legal 500 IP-listed Scottish solicitors in 76.6% of non-bulk infringement actions (49 of 64 actions). Among alleged infringers, as shown in Table 1, 68.8% of non-bulk enforcement cases involved at least one firm of lawyers on the other side – approaching proportionally three times as many as in bulk enforcement actions. The alleged infringers made no appearance at all, in person or through legal representation, in 29.7% of non-bulk cases, a much lower rate of non-appearance than in bulk enforcement claims. Large non-bulk rightholders faced broadly the same levels of opponent appearance and legal representation as non-bulk rightholders generally: 13 of 18 claims by non-bulk large rightholders (72.2%) involved a party litigant or solicitors acting for at least one party on the other side with only 5 such cases (27.8%) in which the alleged infringers made no appearance and had no representation.

## 4.2 Interim interdict

Having introduced the parties and identified bulk enforcers as the 'repeat players', in Galanter's sense, in the Court of Session dataset, this section turns to the data on case trajectories, starting with interim interdict. Interim interdict is particularly important in IP disputes. Although subject to different rules than in England and Wales,<sup>38</sup> in essence the remedy is the same: an interim prohibition against the allegedly infringing conduct pending final determination of the case. Interim interdict is typically sought at the very outset of a dispute, immediately after the Summons is 'signed' (issued) and before the Chapter 55 procedural timetable begins.

Across the 98 infringement actions in the dataset, interim interdict procedures were initiated in 60 cases (61.2%). Although it is possible that rightholders were 'picking their fights',<sup>39</sup> on the face of the data at least, rightholders enjoyed a high success rate. Figure 1 illustrates the outcomes of the 60 motions by which interim interdict was sought.<sup>40</sup> Interim interdict was granted in 71.7% of those cases, in most instances *ex parte*

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<sup>37</sup> There were two defenders each involved as alleged infringer in two non-bulk actions. However, as the cases each was involved in differed, they are not considered 'repeat players' in Galanter's sense. See also note 30 re data collection on this point.

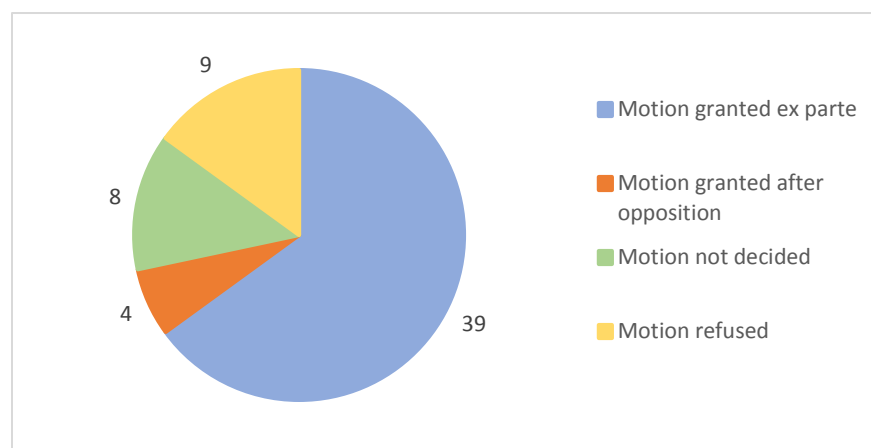
<sup>38</sup> For a very brief comparison of the legal tests, see Law Commission Consultation Paper No. CP212 'Patents, Trade Marks and Design Rights: Groundless Threats', April 2013 ([http://lawcommission.justice.gov.uk/docs/cp212\\_patents\\_groundless\\_threats.pdf](http://lawcommission.justice.gov.uk/docs/cp212_patents_groundless_threats.pdf)), p31. The Scottish 'caveat' system, whereby a party can lodge at court a filing requiring advance notice of any motion for interim interdict against them before it is heard, is particularly notable and may assist in avoiding the need for an order from the court.

<sup>39</sup> There were 25 actions in which the Summons included a legal plea for interim interdict but no steps appear to have been taken to pursue this. These may just have been standard-form pleas; alternatively, there may have been a filtering process in which interim interdict was not sought in weaker cases.

<sup>40</sup> Figure 1 data: motion granted *ex parte* – 39 actions; motion granted after opposition (at the first hearing or on recall) – 4 actions; motion not decided – 8 actions; motion refused – 9 actions.

(without notice) and without returning to court on a counter-motion for recall of the granted order. The motion was not decided in 13.3% of cases, often because of the provision of voluntary undertakings by the alleged infringer. Interim interdict was only refused in nine actions, 15% of the cases in which an order was sought.

**Figure 1: Motions for interim interdict – outcomes**  
(Total actions: 60)



Bulk enforcement accounted for 55.8% of all instances in which interim interdict was granted (24 of a total of 43 granted motions). All but two motions for interim interdict in bulk enforcement actions were granted (24 of 26 such motions – 92.3%), in all cases *ex parte*. Two bulk enforcement motions were not decided; none were refused. In non-bulk enforcement cases, outcomes were more mixed: 19 motions were granted (four after opposition), six were not decided and nine were refused. Although the case numbers are small, across the eight non-bulk actions in which large rightholder entities sought interim interdict those large rightholders did less well than bulk enforcers: the order was granted in only two cases (25%), not decided in three actions (37.5%) and refused in three (37.5%).

The practitioner literature notes that the grant of interim interdict is, in practice, often key to resolving the dispute.<sup>41</sup> With this in mind, the data was examined to establish in how many infringement actions the outcome of the motion for interim interdict was, in effect, the end of the case. This appears to have happened often: 45.0% of the cases in which interim interdict was sought (27 of 60 actions) effectively proceeded no further after the motion was dealt with one way or another. This was broadly consistent across bulk and non-bulk enforcement claims.<sup>42</sup> Bulk enforcers do, however, seem to have encountered a higher rate of non-compliance on the part of infringers: steps were taken by rightholders to pursue breach of interim interdict in six actions, five of which were bulk enforcement claims.

<sup>41</sup> R. Buchan and G. Grassie, 'Intellectual property disputes in Scotland' JIPLP 2011, 6(2), 120-127, p123.

<sup>42</sup> The case proceeded no further in 42.3% of bulk enforcement actions (11 of 26 actions) and 47.1% of non-bulk claims (16 of 34 actions).

### 4.3 Progress through the Chapter 55 procedural timetable

The first step in a Chapter 55 IP action is the ‘signetting’ (issue) of the Summons by the court. After service (and, typically, any motion for interim interdict, if sought), the Summons is returned to court for ‘calling’ (publication on the court lists). Calling starts the Chapter 55 timetable and shifts the onus onto the alleged infringer. Within 3 days the alleged infringer must ‘enter appearance’, confirming their intention to defend, and within 7 days must lodge defences, failure to do so giving grounds for summary decree (judgment in default).

Until the November 2012 reforms to the Chapter 55 procedure, after the lodging of defences IP actions entered a so-called ‘adjustment period’, an extendable (and, in practice, often extended) 3-month period in which the parties could adjust their pleadings without costs implications. Thereafter, actions progressed to a ‘Procedural Hearing’. Under the post-November 2012 version of Chapter 55, upon defences being lodged the action moves directly to what is now called a ‘Preliminary Hearing’ to decide further procedure. Although cases may call in court on an ad hoc basis on the motion of a party at any time, the Procedural/Preliminary Hearing is the first formally prescribed appearance before the judge. Thereafter, cases may proceed in different ways, including to a ‘debate’ (a form of legal strike-out hearing) or a ‘proof’ (trial). As in England and Wales, quantum is typically addressed after liability.

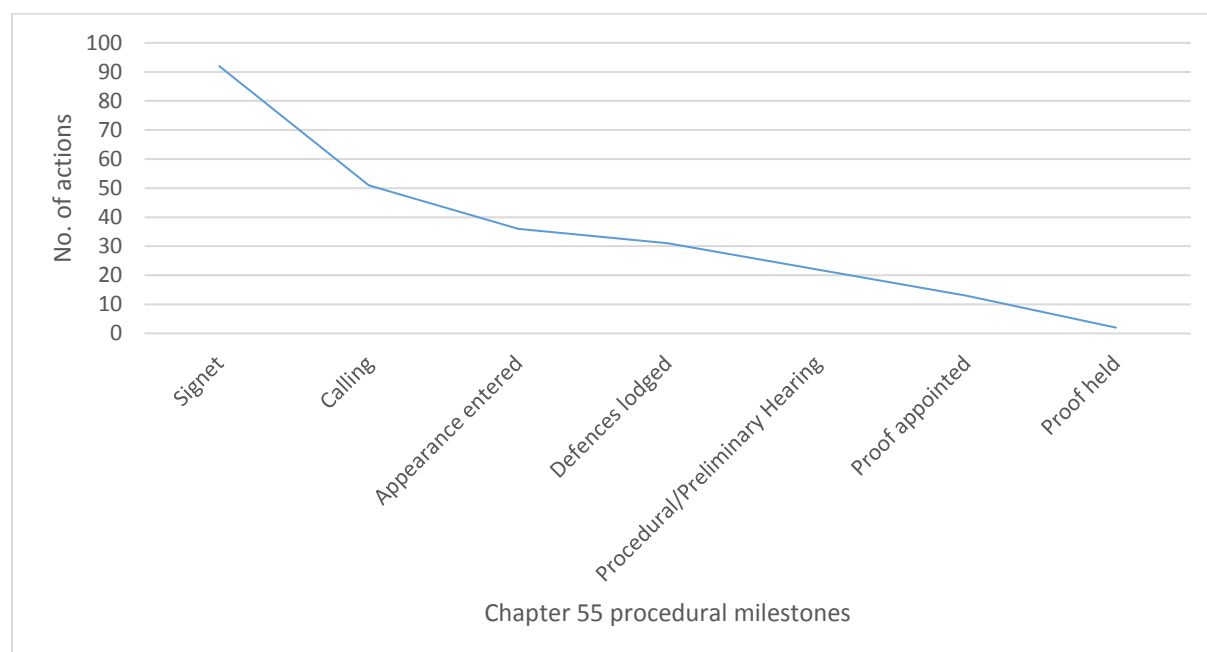
All actions were coded using a simplified version of this procedural timetable to identify how far through Chapter 55 each action had progressed at the time of its conclusion or, for live actions, as at data collection.<sup>43</sup> Focussing on the 92 concluded infringement actions in the dataset, Figure 2 illustrates the number of cases which reached the various key milestones:<sup>44</sup>

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<sup>43</sup> For simplification purposes, in this analysis Procedural and Preliminary Hearings are deemed the same; cases ending during the old ‘adjustment period’ have been coded as ending after defences were lodged. For simplicity, as they do not necessarily bring proceedings to a conclusion, this article does not report on the appointing or holding of debates: the relatively few actions in the dataset which went to debate have been coded as ending after the Procedural/Preliminary Hearing. Not all actions followed the Chapter 55 timetable perfectly: coding is based on the last Chapter 55 procedure reached, ignoring any skipped steps.

<sup>44</sup> Figure 3 data: no. of actions signetted – 92; no. of actions called – 51; no. of actions in which appearance entered – 36; no. of actions in which defences lodged – 31; no. of actions in which Procedural/Preliminary Hearing held – 22; no. of actions in which proof appointed – 13; no. of actions in which proof held – 2.

**Figure 2: Case trajectories – concluded rightholder-commenced infringement actions**  
(Total actions: 92)



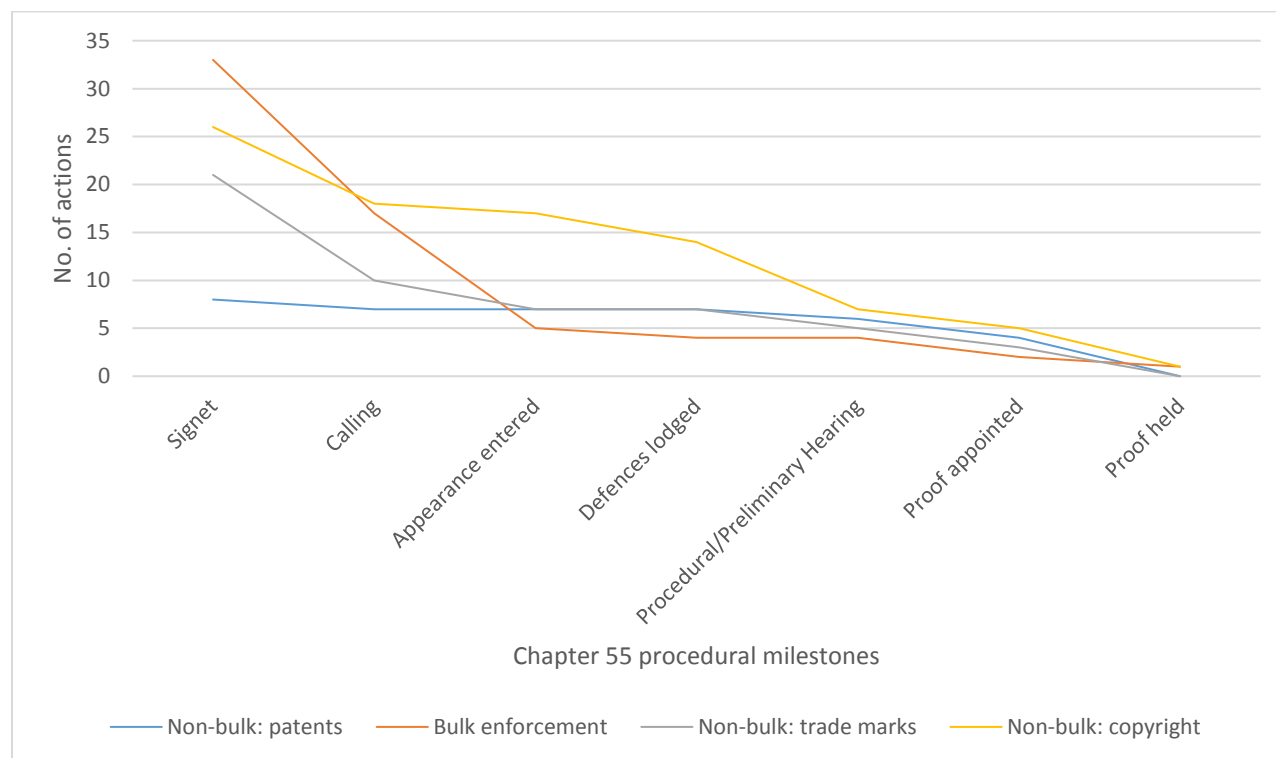
As Figure 2 shows, across the concluded actions in the dataset the number of infringement actions progressing through the Chapter 55 timetable dropped off steadily at each procedural stage. 44.6% did not proceed beyond signetting and a further 16.3% got no further than calling. Only 33.7% reached the stage of defences being lodged and only 23.9% reached a Procedural/Preliminary Hearing. A proof was appointed in only 13 actions (14.1%) actions and was only actually held in two cases (2.2%). Consistent with observations in the literature that parties tend to settle on quantum after a decision on liability,<sup>45</sup> there were no hearings on quantum. There were no appeals against judgment on infringement.

Breaking down the data by bulk/non-bulk enforcement and, for non-bulk cases, by IP right provides further insights. Figure 3 illustrates the case trajectory data for the 92 concluded infringement actions split into four categories: bulk enforcement cases; and three categories of non-bulk enforcement action – non-bulk cases

<sup>45</sup> Weatherall et al, note 3, p59.

involving patents, registered trade marks and copyright.<sup>46</sup> It has been noted in the literature that trade mark and other IP cases are likely to display different dynamics to patent litigation.<sup>47</sup> Figure 3 bears that out:

**Figure 3: Case trajectories – concluded infringement actions: split by bulk/non-bulk and IP right**



<sup>46</sup> A significant proportion of non-bulk IP actions involved more than one type of IP right and there are, therefore, overlaps between the non-bulk enforcement categories in Figure 3. No account is taken of any non-IP additional elements to the claim (see note 16). The Figure 3 data is as follows:

	Concluded actions			
	Bulk	Non-bulk Patents	Trade marks	Copyright
No. of actions signetted	33	8	21	26
No. of actions called	17	7	10	18
No. of actions in which appearance entered	5	7	7	17
No. of actions in which defences lodged	4	7	7	14
No. of actions in which Procedural/Preliminary Hearing held	4	6	5	7
No. of actions in which proof appointed	2	4	3	5
No. of actions in which proof held	1	0	0	1

<sup>47</sup> Weatherall et al, note 3, p35. See also Landes, note 8.

Although the smallest population in Figure 3 (with only eight concluded infringement actions), cases involving patents had the steadiest rate of contestation by the alleged infringer through into the later stages of Chapter 55 procedure: the case called, appearance was entered and defences were lodged in seven of the eight actions (87.5%) and, by the time of the Procedural/Preliminary Hearing, six (75%) of those eight actions were still live. Four (50%) actions were appointed to proof, although none were ultimately held.

The other categories of non-bulk enforcement case showed higher rates of attrition, particularly in their early stages. 69.2% of non-bulk actions involving copyright reached calling, with appearance entered in 65.4% and defences lodged in 53.8% of such cases. Only 47.6% of non-bulk actions involving registered trade marks reached calling, with appearance entered and defences lodged in 33.3% of such cases. 73.1% of cases involving copyright and 76.2% of cases involving registered trade marks ceased without reaching a Procedural/Preliminary Hearing. Five actions involving copyright (19.2%) and three actions involving registered trade marks (14.3%) were appointed to a proof; only one proof was actually held, in copyright case.

Perhaps most striking in Figure 3 is the data on bulk enforcement actions. These had by far the highest rate of attrition in their early stages: across a total of 33 concluded bulk enforcement actions, appearance was entered in only five cases (15.2%) and defences lodged in only four (12.1%). This high rate of attrition was notably steeper than among non-bulk enforcement actions by large companies: 55.6% of those cases (more than three times as many) reached the stage of appearance being entered and 50% (more than four times as many) saw defences being lodged.<sup>48</sup> After the lodging of defences, the rate of contestation in bulk enforcement cases remained relatively steady into the later stages of the Chapter 55 procedure. Two bulk enforcement proofs were appointed and one was held.

#### 4.4 Case outcomes

Of the 92 formally and informally concluded infringement actions in the dataset, 51.1% (47 actions) were formally brought to an end by a court order of some kind.<sup>49</sup> 48.9% (45 actions) simply ceased, without any court order.<sup>50</sup> In terms of the Chapter 55 procedural milestones discussed above, all bar one of those ‘informally’ concluded actions ceased early on without the alleged infringers entering appearance and, in the majority of instances (27 actions, 60%) after the outcome, one way or another, of a motion for interim interdict.<sup>51</sup>

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<sup>48</sup> The data for non-bulk enforcement actions brought by large companies is: no. of actions signetted – 18; no. of actions called – 12; no. of actions in which appearance entered – 10; no. of actions in which defences lodged – 9; no. of actions in which Procedural/Preliminary Hearing held – 7; no. of actions in which proof appointed – 5; no. of actions in which proof held – 0.

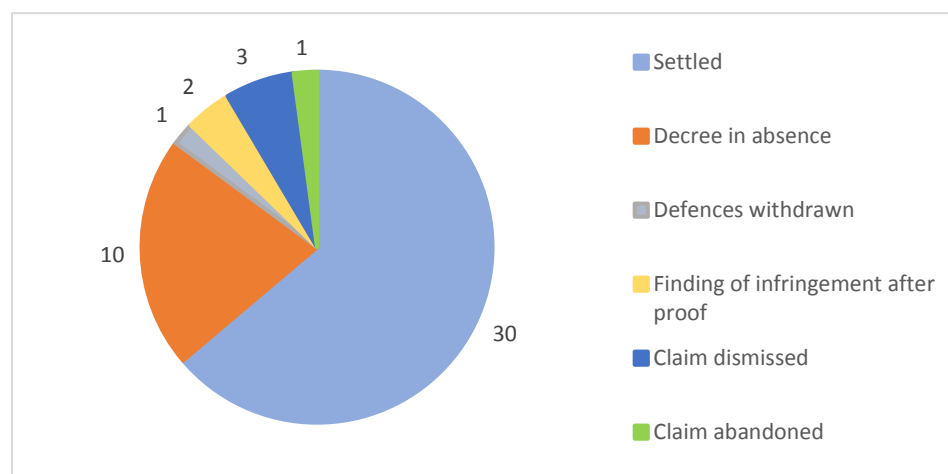
<sup>49</sup> Including, for present purposes, orders dealing with some but not all co-defenders or some but not all remedies sought, in both scenarios if no steps were taken to pursue the action further.

<sup>50</sup> All such cases had been completely inactive for at least nine months prior to data collection and in most cases for very considerably longer.

<sup>51</sup> The remaining such action was coded (see note 43) as having ended after defences were lodged.

Figure 4 illustrates how the actions which were formally disposed of by court order came to an end:<sup>52</sup>

**Figure 4: Formally concluded actions – outcomes**  
(Total actions: 47)



As Figure 4 shows, 63.8% (30 actions) were formally disposed of on the basis that they had settled.<sup>53</sup> This was not, however, necessarily a quick process: one-third of those cases (10 actions) settled only after having reached the stage of a proof being appointed – four on the very day the trial was due to begin, four within the previous week and one within the previous month. Among the remaining actions which were formally settled, seven (23.3%) settled after defences were lodged and seven (23.3%) after the Procedural/Preliminary Hearing.

Across other formally-concluded cases, outcomes were mostly favourable to rightholders: decree in absence was granted against the infringers in 10 actions, the defences were withdrawn in one action and there was a finding of infringement after proof in two actions, both of the two actions in the dataset which went to trial. Only four actions involved an outcome unfavourable to the rightholder: three in which the claim was dismissed and one in which the claim was abandoned. All of these different outcomes were reached after varying amounts of work by the parties in terms of court-facing procedural steps: while (perhaps unsurprisingly) the actions disposed of by decree in absence proceeded no further than calling, the action in which the defences were withdrawn reached the stage of a proof being fixed and, among the four cases with outcomes favourable to the defenders, two reached the stage of holding (and in one such case, appealing from) a strike-out debate.

Looking at the data another way, Table 2 breaks down the 92 concluded infringement actions by different categories of outcome: first, the informally concluded cases, disposed of without a court order; and thereafter,

<sup>52</sup> Figure 4 data: settled – 30 actions; decree in absence – 10 actions; defences withdrawn – 1 action; finding of infringement after proof – 2 actions; claim dismissed – 3 actions; claim abandoned – 1 action.

<sup>53</sup> Typically effected in Court of Session proceedings by counsel for the parties signing a ‘joint minute’ recording that the dispute has settled and indicating on what formal procedural basis it should be disposed of by the court.



three categories of formally concluded actions.<sup>54</sup> In cases formally disposed of as settled, the court's role in the actual disposal of the case is little more than to 'rubber-stamp' the terms of disposal agreed by the parties. In actions judicially disposed of but without full substantive determination, the case is brought to an end by some form of judicial determination not entailing full judgments on the merits, such as decree in absence or (at a more involved level) a strike-out debate. Only actions taken to proof are disposed of by full substantive judicial determination.

As Table 2 shows, just under half of all concluded actions (48.9%) came to an end informally. Approaching one-third (32.6%) were formally concluded on the basis that they had settled. The court made some form of non-fully substantive judicial determination in 15 actions (16.3%),<sup>55</sup> and full substantive determination in only two actions (2.2%).

**Table 2: Concluded actions - case outcomes**  
(Total actions: 92)

	Concluded actions					
	All actions		Bulk enforcement actions		Non-bulk enforcement actions	
'Informally' concluded	45	48.9%	19	57.6%	26	44.1%
Formally concluded – settled	30	32.6%	5	15.2%	25	42.4%
Formally concluded – non-fully substantive judicial determination	15	16.3%	8	24.2%	7	11.9%
Formally concluded – full substantive judicial determination	2	2.2%	1	3.0%	1	1.7%
Total	92		33		59	

Although the percentage of Court of Session IP actions noted in Table 2 as disposed of by full substantive judicial adjudication after proof (2.2%) may appear very small, very low figures for disposals by judgment after trial also have been reported in empirical research into US federal patent and copyright litigation.<sup>56</sup> In total, 18.5% of all concluded infringement actions in the Court of Session dataset reached some form of fully or non-fully substantive judicial determination. If we assume that all informally concluded actions were settled

<sup>54</sup> See also J.P. Kesan and G. Ball, 'How are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes', 84 Wash. U. L. Rev. 237 2006, Tables 4-6 for (US-specific) groupings of case outcomes by different degrees of judicial involvement.

<sup>55</sup> Including the actions in which the claim was abandoned or defences withdrawn, both of which necessitate a court order to reflect this.

<sup>56</sup> Kesan and Ball, note 54, pp273-274, Tables 4-6 (judgment on jury and bench trials amounting to between 3-6% of concluded federal patent cases reviewed in 1995, 1996 and 2000); Cotropia and Gibson, note 21, p2002, Table 12 (termination via trial in 2.87% of the copyright litigations categorised by them as 'Commonplace Cases').

between the parties,<sup>57</sup> taken together with the formally settled cases the overall settlement rate across the dataset was 81.5%.

There was, however, a distinction between bulk and non-bulk enforcement cases. Although a greater proportion of bulk actions came to an end informally, fewer bulk cases were formally settled (15.1% compared to 42.4% of non-bulk cases). A greater percentage of bulk actions concluded with some form of substantive or non-fully substantive judicial determination (27.3% compared to 13.6%). As a result, the overall assumed settlement rate (informally concluded and formally settled actions) was slightly lower in bulk enforcement actions (72.7%) compared to non-bulk enforcement claims (86.4%). Large non-bulk enforcers had a similar experience in terms of overall assumed settlement.<sup>58</sup>

## 4.5 Case durations

Figure 5 illustrates the durations of the 92 formally and informally concluded infringement actions from their commencement to the date of the last procedure on record, with bulk and non-bulk claims highlighted:<sup>59</sup>

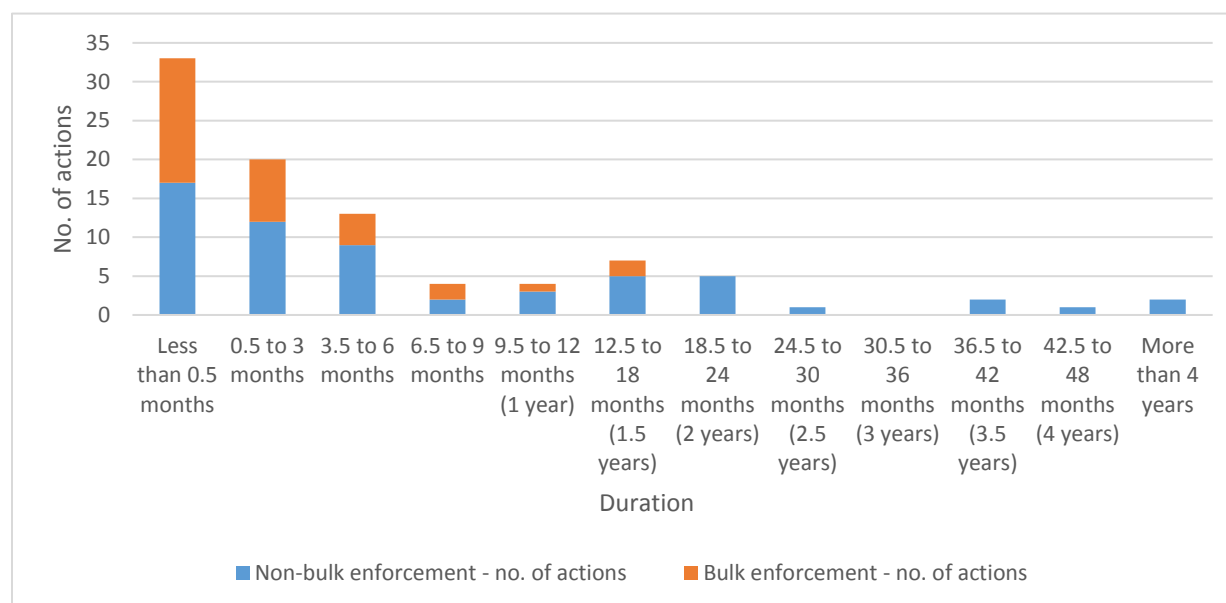
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<sup>57</sup> This assumption is reasonable given that all but one of the ‘informally’ concluded actions ended before the defender entered appearance: if not settled, the rightholder only had to lodge the Summons for calling to place the onus on the defender and potentially be able to obtain decree in absence. See also: Galanter, note 7, p27 noting that, if not formally noted or ratified by the court, from the court's viewpoint settled cases may appear to have been abandoned; and Kesan and Ball, note 54, p272 for an example of inferences as to settlement being drawn (analysed as ‘Settlements and Probable Settlements’ in Tables 4-6).

<sup>58</sup> Of the 18 concluded non-bulk infringement actions brought by large rightholders, six (33.3%) were informally concluded, seven (38.9%) were formally settled and five (27.8%) reached non-substantive judicial determination. There were no full substantive judicial determinations in such cases. This gives an overall assumed settlement rate (informally concluded actions and formally settled actions) of 72.2%.

<sup>59</sup> Durations were calculated to the nearest half month, assuming a standard month of 30 days. Figure 6 data: concluded in less than 0.5 months – 33 actions (16 bulk); 0.5 to 3.0 months – 20 actions (8 bulk); 3.5 to 6.0 months – 13 actions (4 bulk); 6.5 to 9.0 months – 4 actions (2 bulk); 9.5 to 12 months – 4 actions (1 bulk); 12.5 to 18.0 months – 7 actions (2 bulk); 18.5 to 24.0 months – 5 actions (non-bulk); 24.5 to 30.0 months – 1 action (non-bulk); 30.5 to 36.0 months – no actions; 36.5 to 42.0 months – 2 actions (non-bulk); 42.5 to 48.0 months – 1 action (non-bulk); more than 48.0 months – 2 actions (non-bulk).

**Figure 5: Concluded infringement actions – split by bulk and non-bulk enforcement**  
(Total actions: 92)



Of course, we cannot know from the court file how much prior or subsequent interaction there may have been between the parties outside the court proceedings. We also cannot know from the Court of Session data the extent to which cases which might have taken longer to litigate (or, at least, to litigate to the point of being able to secure a settlement) simply did not come before the court. As Figure 5 shows, however, many of the actions reviewed were concluded in a relatively short period of time at least in terms of on-the-record activity before the court: 35.9% (33 actions) in under half a month and a further 35.9% within six months. This is perhaps unsurprising given the high rates of early case attrition discussed above. Overall, 80.4% of concluded actions (74 cases in total) came to an end within a year and only a small number of cases (six actions) lasted for more than 2 years, albeit in some cases for substantially longer than that. Across the six live infringement actions in the dataset (not shown in Figure 6), case durations as at data collection ranged from 10.5 to 79.5 months.

Comparing, on the one hand, concluded bulk enforcement actions and, on the other, concluded non-bulk actions involving patents, registered trade marks and copyright, the mean, median, and range of case durations is set out in Table 3.<sup>60</sup>

<sup>60</sup> See note 46 re overlap between IP rights in the non-bulk claims.

**Table 3: Concluded infringement actions – durations**

Concluded actions	Durations – in months (to nearest 0.5 month)			
	Mean	Median	Standard deviation	Range
Bulk enforcement actions (33 actions)	2.7	1.5	4.4	0.0 - 16.0
Non-bulk enforcement actions:				
Involving patents (8 actions)	21.4	17.3	19.9	0.0 - 60.0
Involving registered trade marks (21 actions)	4.3	1.0	6.0	0.0 - 22.5
Involving copyright (26 actions)	12.4	3.5	17.5	0.0 - 67.0

There were clear differences between the experiences of bulk enforcers and other rightholders. As Table 3 shows, concluded bulk enforcement actions had the lowest mean duration, almost the lowest median duration and the smallest overall range. As can be seen from Figure 5, 72.7% of bulk actions came to an end within three months compared to 49.2% of non-bulk claims. No bulk enforcement action lasted longer than 18 months.

Large non-bulk rightholders spent longer than bulk enforcers in litigation: the mean duration of a non-bulk large rightholder claim was 12.0 months (compared to 2.7 for bulk enforcers), with a median of 6.0 months (compared to 1.5) and a range of 0.0 to 60.0 months (compared to 0.0-16.0). Only 38.9% of concluded claims brought by large rightholders were resolved within three months (7 of 18 actions – compared to 72.7% of bulk cases disposed in this time period) with six actions (33.3%) taking over a year and three actions (16.7%) taking more than two years.

## 5 Comment

It is clear from the data that the overwhelming majority of Chapter 55 infringement actions reviewed came to an end, one way or another, ‘in the shadow of the law’.<sup>61</sup> From the actions which proceeded no further than signet or a motion on interim interdict to those which were settled in the run-up to trial, whatever the degree of actual exposure to the court process, most cases in the dataset came to an end as a result of private, out-of-court decisions by the parties rather than through judicial adjudication.

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<sup>61</sup> R.H. Mnookin and L. Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ 88 Yale LJ 950 1978-1979.

This high incidence of ‘private ordering’ is consistent with findings from other jurisdictions indicating that most IP litigations settle.<sup>62</sup> It is often assumed that settlement is a less expensive result than pursuing litigation. The Court of Session data at least to some degree challenges that assumption: although many cases were resolved quickly, other settlements must have been far more hard-won in terms of the time and legal effort expended. Litigation and settlement are not binary alternatives: those harder-won settlements are a useful reminder that litigation is not a ‘one-time choice’ between settlement or trial, but an on-going process with settlement opportunities all along the way.<sup>63</sup>

It is, of course, not possible to deduce from the court file alone the full merits of a case or parties’ private cost, resource or other constraints.<sup>64</sup> The Court of Session dataset is, as noted above, also relatively small in terms of the total cases reviewed, making broad statistical analysis such as that conducted elsewhere (particularly in the US) impossible. Standing these caveats, however, the Court of Session data does appear consistent with the theoretical models in key respects. The rate of attrition as cases progressed through Chapter 55 (Figure 2) and the distribution of cases across the increasingly formal and increasingly substantive ways in which actions were brought to an end (Table 2) are, for example, good fits for the ‘dispute pyramid’ discussed in the socio-legal literature. The Court of Session data is also consistent with economic theories expecting cases to settle as uncertainty and information asymmetry reduce. This can be seen from Figure 2, but is best illustrated by Figure 3. Given their highly technical and legally complex subject matter, patent actions are those in which the parties are most likely to need detailed expert and other evidence to have been gathered and exchanged before the merits of their respective positions can be fully assessed and settlement considered – in other words, before uncertainty or information asymmetry can be evened out.<sup>65</sup> Australian practitioner survey research has indicated that patent disputes tend to settle in the later stages of court procedure.<sup>66</sup> Recent empirical research analysing US federal district court patent litigation docket entries has also shown the most marked drop-off in continuing cases towards the later procedural milestones reviewed.<sup>67</sup>

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<sup>62</sup> For example: Weatherall et al, note 3, pp36-37; Kesan and Ball, note 54, pp259 and 271; Gallagher, note 7, p468; K. Cremers and P. Schliessler, ‘Patent litigation settlement in Germany: why parties settle’ *Eur. J. Law Econ.* (2015) 40:185-208, p193; Helmers et al, ‘Evaluation’, note 5, pp30-34.

<sup>63</sup> C. Albiston, ‘The Rule of Law and the Litigation Process’ in H.M. Kritzer and S. Silbey (eds), *In Litigation: Do the “Haves” Still Come Out Ahead?* (Stanford University Press, 2003), p175.

<sup>64</sup> Or the relative impact of any additional non-IP elements in dispute (see note 16).

<sup>65</sup> The particular complexities of patent litigation is noted *inter alia* in: J. Farrell and R.P. Merges, ‘Incentives to challenge and defend patents: why litigation won’t reliably fix Patent Office errors and why administrative patent review might help’ 19 *Berkeley Tech. L.J.* 943 2004, pp948-949; J. Bessen and M.J. Meurer, ‘Lessons for patent policy from empirical research on patent litigation’ 9 *Lewis & Clark L. Rev.* 1 2005, p2. .

<sup>66</sup> C. Dent and K. Weatherall, ‘Lawyers’ decisions in Australian patent dispute settlements: An empirical perspective’, *Australian Intellectual Property Journal* 2006, 17(4), 255-276, p265, also noting the consistency of their findings with economic theory.

<sup>67</sup> C.A. Cotropia, J.P. Kesan, K. Rozema and D.L. Schwartz, ‘Endogenous Litigation Costs: An Empirical Analysis of Patent Disputes’ (3 January 2017), Northwestern Law & Econ Research Paper 17-01; University of Illinois College of Law Legal Studies Research Paper No. 17-14 (available at <https://ssrn.com/abstract=2893503>). Defendants filed an answer to the complaint against them in 79% of patent cases reviewed and the litigation reached a case management conference in around 59% of cases; 10% reached the stage of a subsequent *Markman* claim construction hearing and 3% reached the stage of commencing trial: pp2-3, 8-11 and Table 1.

It is therefore not surprising to see, from Figure 3, that actions involving patents exhibited a steady rate of contestation into the later stages of Chapter 55 procedure or that they had the longest mean and median durations in Table 3. On the other hand, trade mark and copyright actions should, in the UK at least,<sup>68</sup> be legally and evidentially relatively less complex and uncertain, and thus easier to settle: as Table 3 and Figure 3 show, cases involving trade marks and copyright were generally disposed of faster and earlier in procedural terms.

This should not imply that all cases in the dataset were necessarily conducted as rationally by the parties as the economic models assume. A small number of actions with low, or even no, monetary claims were among those lasting at least a year or more - although the overall value of IP litigation is hard to judge from monetary claims alone given the particular importance, in the IP context, of remedies such as interdict.<sup>69</sup>

Also apparently irrational, in economic terms at least, were a number of the defenders in the bulk enforcement cases. Those cases were, as noted at 4.1 above, legally straightforward. As Figure 3 shows, however, although most alleged infringers in bulk enforcement cases immediately conceded a small number hung on into the later stages of the Chapter 55 procedure. Why might this be so? One possibility is that court proceedings in bulk enforcement disputes are started not because there are any material legal issues in dispute but to 'up the stakes' against recalcitrant infringers. Although some infringers in the bulk enforcement cases may have acted inadvertently, others had evidently acted recklessly or even knowingly. The bulk cases which lasted longest may have been against the most obdurate infringers who, even with proceedings active against them, nonetheless refused to concede. Bosland et al have noted that theories which predict that straightforward cases should settle do not take into account 'the uncooperative respondent' who is, in economic terms, not acting rationally.<sup>70</sup> The particular challenges posed by such infringers might explain why almost all breaches of interim interdict were in bulk enforcement actions. Indeed, although also potentially attributable to other factors (not least advantages of centralisation), they could at least partially explain the increase in bulk enforcement actions in the more recent years in the dataset: it is possible, for example, that such claims were previously brought in the Scottish Sheriff Courts, a strategic change of forum to the Court of Session offering a way to increase the magnitude of the fight facing infringers.<sup>71</sup>

As noted at 4.1 above, the Court of Session bulk enforcers are paradigms of Galanter's 'repeat players'. The expectation is that they should 'come out ahead' in the litigations they pursue, at least in so far as we can compare their litigation experience to other rightholders. Do we see this in the Court of Session dataset?

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<sup>68</sup> Copyright litigation in the UK should generally be less prone to the particular complexities noted by Cotropia and Gibson in the US: note 21.

<sup>69</sup> Over 95% of actions in the dataset sought permanent interdict to prohibit on-going and future infringements: see further Cornwell, note 2. This included the long-running low monetary claim cases mentioned here.

<sup>70</sup> J. Bosland, K. Weatherall and P. Jensen, 'Trade mark and counterfeit litigation in Australia' IPQ 2006, 4, 347-377, p367. They suggest that infringer non-cooperation could explain why some trade mark counterfeiting cases, which are straightforward and should otherwise settle, may have to be pursued to judgment.

<sup>71</sup> Data from England and Wales shows that most collecting society actions are pursued at the level of the English High Court: Helmers et al, 'Evaluation', note 5, pp16-17.

There can, of course, be difficulty in knowing what ‘coming out ahead’ actually means.<sup>72</sup> There was little evidence on the face of the court files themselves of bulk enforcers ‘playing for rules’, as was Galanter’s concern – that is, focussing not on individual case wins but aiming to shape development of the law overall by setting useful precedents and avoiding negative ones – although it is not possible to know whether any claims were simply not litigated at all, to this end.<sup>73</sup> We also cannot know from court files what is happening out of court – how favourable terms of settlement actually are, whether they are actually adhered to or judgments complied with. With only two actions in the dataset reaching trial, it is also difficult to talk meaningfully about ‘win rates’.

Nonetheless, bulk enforcers do appear to have enjoyed a number of positives in their litigation experience compared to other rightholders. In most cases, the alleged infringer did not appear. Bulk enforcers never had a motion for interim interdict refused. Bulk enforcers also experienced the steepest rates of early case attrition; although having recourse more often to non-substantive judicial rulings such as decree in absence, bulk enforcers were also ultimately typically able to dispose of their claims fastest. It is also striking that so many bulk enforcement claims were, on their face at least, low value in monetary terms. Although a wider objective may have been deterrence (making it worth pursuing ‘loss leader’ cases to secure favourable publicity),<sup>74</sup> it has also been noted that repeat players may enjoy advantages in legal representation, particularly in economies of scale and lower start-up costs per case.<sup>75</sup> The bulk enforcers here may have enjoyed advantageous fee rates as a result of bulk instruction of work. For the Court of Session bulk enforcers at least, ‘coming out ahead’ may have been a relatively prosaic series of marginal gains – albeit gains which add up over multiple litigations: interim interdict more reliably obtained and disputes disposed of more speedily, with less work against less opposition and all at less cost in terms of legal fees.

There should, of course, be no objection to the proposition that clear-cut cases which conform to familiar law or fact patterns should be capable of being disposed of efficiently. It is also important to stress that (assuming settlements and other off-the-record disposals were no less favourable for them than for bulk enforcers) the ‘one-shotter’ rightholders in the dataset were, at least on the face of the data, not dramatically worse off. Even among ‘one-shotter’ rightholders, most motions for interim interdict were granted and most actions came to an end relatively quickly, without the need for judicial determination. Although Galanter’s work and much of the subsequent literature speaks of ‘haves’ and ‘have nots’, those expressions seem inapt at least for present purposes.

Nonetheless, there is a clearly identifiable group of ‘repeat players’ in the dataset which generally gained in procedural terms. There is some evidence of parallels in other jurisdictions. Cotropia and Gibson report a considerably lower rate of contestation in the US copyright file sharing cases reviewed by them compared to

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<sup>72</sup> J.B. Grossman, H.M. Kritzer, S. Macaulay, ‘Do the “Haves” Still Come Out Ahead?’ 33 Law & Soc’y Rev. 803 1999, p809. See also Lempert, note 14, pp1109-1110.

<sup>73</sup> Galanter, note 10, p99-103; Grossman et al, note 72, p804.

<sup>74</sup> It has been noted that, for trade mark owners, counterfeiting proceedings are not solely about bringing the contested infringement to an end, but also involve wider deterrence considerations: Bosland et al, note 70, pp367-368. Galanter has also noted that a ‘repeat player’ litigant must ‘establish and maintain credibility as a combatant’: Galanter, note 10, p99.

<sup>75</sup> Galanter, note 10, pp98 and 114.

their category of ‘commonplace’ copyright cases.<sup>76</sup> Bosland et al’s study of decided Australian trade mark cases highlighted a high rate of non-appearance by infringers, relatively speedy proceedings and a consistent rate of success for rightholders in the trade mark counterfeiting disputes reviewed by them, marking those counterfeiting cases out as a different ‘world’ of litigation compared to non-counterfeiting trade mark disputes.<sup>77</sup>

Can we deduce what might have caused the procedural gains enjoyed by the ‘repeat players’ in the Court of Session dataset and, most importantly, whether this was a function of ‘repeat player’ status? The bulk enforcement cases in the dataset did not require complex tactical manoeuvring of the kind which might advantage an experienced litigant. As noted throughout section 4, bulk enforcers tended to ‘do better’ than large non-bulk rightholders, suggesting at least tentatively that firm size (and, thus, assumed advantages in resource and power) were not in themselves the cause - although the subject matter and value of large non-bulk rightholder claims tended to range widely, making this a difficult comparison. The literature suggests that repeat players are advantaged by access to specialist legal representation.<sup>78</sup> However, most rightholders in the dataset - bulk enforcers and ‘on-shotters’ alike – were represented by Legal 500 IP-listed firms. Comparing bulk enforcers and the non-bulk enforcers also represented by Legal 500 IP-listed firms, bulk enforcers still ‘did better’, with greater success in interim interdict, higher rates of early case attrition and faster overall case resolution.<sup>79</sup> Specialist legal representation also does not therefore appear to be the determining factor. The low incidence of validity counterclaims across the dataset as a whole suggests that there was no particular advantage in the strength of bulk enforcers’ rights. With most bulk enforcement cases coming to an end before the Procedural/Preliminary Hearing, it also seems unlikely that (even with most bulk claims dating from 2013 or later) high early case attrition rates can be attributed to the increased case management powers implemented in 2012.

It is possible that unobservable factors, such as rightholder reputation, may be at play.<sup>80</sup> An important consideration must be the high proportion of bulk enforcement cases in which the alleged infringer made no appearance and, as a result, which came to an early end. It may also be that the bulk enforcement disputes which make up the ‘repeat player’ case load in the Court of Session dataset benefit, quite straightforwardly, from their less complex nature. Indeed, it is also plausible – particularly if the inferences about infringer attitudes noted above are correct - that many defenders in bulk enforcement cases simply know that they are in the wrong, toughing it out until the rightholder is moved to commence proceedings then, in most cases, giving up. Ultimately, if the benefits accruing to bulk enforcers are down to these factors – the

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<sup>76</sup> Comparing the data on defendant response rates reported in Cotropia and Gibson, note 21, at p2004 (defendants’ answers filed in only 11.13% of non-Doe file sharing cases) and p2000 (defendants’ answers filed in 57.70% of ‘Commonplace Cases’).

<sup>77</sup> Bosland et al, note 70, p366 in particular.

<sup>78</sup> Galanter, note 10, pp114 and Figure 3, p125. See also: Grossman et al, note 72, p806.

<sup>79</sup> There were 47 infringement actions in the dataset brought by non-bulk rightholders represented by Legal 500 IP-listed firms. 58.3% of interim interdict motions enrolled in such cases were granted (in 14 of 24 such actions) and 20.8% (in 5 of 24 such actions) were refused (compare to 4.2 above). 51.1% of such actions reached the stage of appearance being entered by the alleged infringer, compared to 15.2% of bulk enforcement cases (see 4.3). 48.9% of such actions came to an end within 3 months, compared to 72.7% of bulk enforcement cases (see 4.5).

<sup>80</sup> See, for example, Gallagher, note 7, pp492-493.



straightforward nature of the legal claims, the attitudes of alleged infringers and/or infringers' lack of legal representation (all of which may be linked) – the procedural gains which the Court of Session data suggests they enjoyed may be less to do with 'repeat player' status as such than the nature of the IP enforcement work which makes up their day-to-day business – the 'constellation of attributes' which Lempert suggested might, on exploration, be more decisive.<sup>81</sup>

## **6 Conclusion**

Although there are limits on the extent to which findings from empirical work of this kind can be generalised to one jurisdiction to another, particularly where court procedure is significantly different, the detailed picture of IP infringement case trajectories and outcomes presented in this paper makes a significant contribution to the growing evidence on IP litigation in the UK. From both an IP and a wider scholarly perspective, the data presented here also provides food for thought in terms of the aptness of wider socio-legal and economic theories to IP infringement litigation - indicating, on the one hand, that key socio-legal and economic models fit well with IP case trajectories while at least tentatively suggesting, on the other, that Galanter's theory of 'repeat player' advantage may, for the Court of Session bulk enforcers at least, have more to do with the nature of their caseload than 'repeat player' status as such. Either way, the Court of Session data reveals the key importance of 'informal' extra-judicial private decision-making by parties at all levels and throughout all stages of the 'formal' court process.

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<sup>81</sup> Lempert, note 14, p1107.